Supreme Court, U. S.
FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-773

KEITH VAGLE,

Petitioner,

vs.

PICKANDS MATHER & COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PAUL J. LOUISELL
Attorney for Petitioner.

OF COUNSEL:

JAMES T. PREST
Attorney at Law
1000 Torrey Building
Duluth, MN 55802

INDEX

Page

OPINIONS BELOW.....1
JURISDICTION.....2
QUESTIONS PRESENTED.....2
STATEMENT OF THE CASE.....4
REASONS FOR GRANTING THE WRIT.....9

I. The Circuit Court Decision repudiates selectively and idiocyncratically Erie v. Tompkins, 304 U.S. 64.....9

II. The decision of the three Judge Panel vitiates Minnesota Statute 604.01 without declaring it unconstitutional even though it was not under attach by any party to the litigation.....9

III. The three Judge Panel decision destroys most of the substance of plaintiff's right created by Minnesota Statute 176.061 without declaring the statute unconstitutional.....9

IV. The decision of the three Judge Panel violates substantive due process and equal protection under the 14th and 10th Amendments.....9

V. The Circuit Courts action denied plaintiff procedural due process under the 14th Amendment.....10

VI. The decision of the Circuit Court is contra the implied admission of respondent's counsel that it is not in accord with Minnesota Law.....10

VII. A Circuit Court does not have power to restore Swift v. Tyson, supra, in its own particular circuit.....10

VIII. The decision of the three Judge Panel overturns both Minnesota State and Federal Court practice without declaring said practice unconstitutional.....10

IX. The Circuit Court opinion confuses plaintiff's rights under Minnesota Statutes 176.01 and 604.01 against joint tort feasors with the rights of joint tort-feasors inter se, both as unconditionally fixed by Minnesota Statute Law and Decision of the Minnesota Supreme Court.....11

X. The Circuit Court decision fails to cite or discuss the controlling Minnesota decisions (the last one handed down 2/16/79) and its own predecessor decision in full accord with said Minnesota decisions.....12

CONCLUSION-summary reversal is appropriate.12
APPENDIX A - Opinion of the Eighth Circuit Court of Appeals.....A1

APPENDIX B - Opinion of the U.S. District Court for the District of Minnesota.....B1

APPENDIX C - Judgment of the U.S. District Court of Minnesota.....C1

APPENDIX D - Journal Entry of Judgment of the U.S. District Court of Minnesota.....D1

APPENDIX E - Judgment of the U.S. Circuit Court of Appeals for the Eighth Circuit.....E1

APPENDIX F - Notice of Judgment of the Circuit Court of Appeals.....F1

APPENDIX G - Minnesota Statutes 176.061.....G1
Minn. decision Law re: joint tort feasors.....G3

TABLE OF CITATIONS.

CASES: Page

Bjerk v. Universal Engineering Corporation, 552 Federal Rep. 2d series 1314..... 5,11,12

Erie v. Tompkins, 304 U.S. 64, 58 S.C. 817.....2,9,10,12,13,14

Johnson v. Raske Building Systems Inc., 276 N.W. 2d 79, Dec. 2/16/79..... 5,7,10,11,12

Lambertson v. Cincinnati Corp., 312 Minn.114, 257 N.W. 2d 679 (1977)..... 8,11,12

National Hockey League v. Metropolitan Hockey Club, 427, U.S. 639 (1976)..... 12

O'Keef v. Smith Hindkman & Gryll Associates, Inc., 380 U.S. 359 (1965)..... 12

Swift v. Tyson, 10 L. Ed. 865, 16 Pet. 1, 18.....2,9,10,12,13,14

United States ex rel Robinson v. Solinston, 316 U.S. 649 (1942)..... 12

STATUTES:

28 U.S.C. §1254(1)..... 2
28 U.S.C. §]332(a)..... 2
M.S. 604.01 - Chapter 604..... 3
M.S. 176.061..... G1
Minn. decision Law re: joint tort-feasors..... G3

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

Keith Vagle,

Petitioner,

-vs-

Pickands Mather & Co.,

Respondent

UNITED STATES DISTRICT COURT
District of Minnesota
Fifth Division
Civ. 5-75-40

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Keith Vagle, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered in the above entitled case on September 17, 1979.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is unreported and is printed in Appendix A hereto, infra, page A1. The Opinion of the United States

District Court for the District of Minnesota is printed in Appendix B hereto, infra, page B1. The Judgment of the United States District Court of Minnesota is printed in Appendix C hereto, infra, page C1 . The Journal Entry of Judgment of the United States District Court of Minnesota is printed in Appendix D hereto, infra, page D1. The Judgment of the United States Circuit Court of Appeals, 8th Circuit, is printed in Appendix E, page E1. The Notice of Judgment of the Circuit Court of Appeals is printed as Appendix F at page F1.

JURISDICTION

The jurisdiction of the United States District Court for the District of Minnesota was invoked pursuant to 28 U.S.C. §1332(a). The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

The opinion of the three-judge panel of the Eighth Circuit Court of Appeals (Appendix A, infra, page A1) was entered on August 20, 1979. A timely petition for rehearing en banc by the full Court was denied without opinion on September 17, 1979, (Appendix A, infra, page A1).

QUESTIONS PRESENTED

I. Should the Circuit Court of Appeals for the Eighth Circuit be authorized to resurrect Swift v. Tyson and overrule Erie v. Tompkins selectively insofar as Statutes of the State of Minnesota and Decisions of its Supreme Court effectuating the provisions of those Statutes are concerned?

II. Should the Circuit Court of Appeals for the Eighth Circuit be permitted to fashion a rule pertaining to the right of recovery under Minne-

sota Statutes 176.061 and 604.01 and the Minnesota Decision Law of Joint and Several liability of tort-feasors in opposition to the rule established by the Minnesota Supreme Court so that the rights of the parties are totally different if the case is litigated in a Minnesota State Court rather than if it is litigated in the United States District Court in Minnesota?

III. Should the Circuit Court of Appeals for the Eighth Circuit be permitted to fashion a rule unique to this particular case and inferentially overturn its own recent opinion complying with Minnesota Statute and Decision Law without citing or commenting on its own predecessor opinion?

IV. Is the decision of the Court of Appeals so clearly erroneous as to allow for summary reversal?

STATUTE INVOLVED

Minnesota Statute 604.01 - Chapter 604. Actions involving negligence, Comparative Fault:

Subdivision 1. SCOPE OF APPLICATION. Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or in injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault ATTRIBUTABLE TO THE PERSON RECOVERING. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall

then reduce the amount of damages in proportion to the amount of fault ATTRIBUTABLE TO THE PERSON RECOVERING. (emphasis by plaintiff counsel)

Minnesota Statute §176.061 - Third Party Liability: Appendix G, page G1.

STATEMENT

Petitioner, plaintiff, appellee, brought his diversity suit in the USDC for Minnesota, Fifth Division, for the recovery of personal injuries as a result of electrocution when, as an employee of a painting contractor, his body received a charge of 13,800 volts of electricity from a transformer substation maintained and operated by respondent (defendant, appellant) while plaintiff was engaged in painting a railroad overpass. A co-employee's metal impregnated hose dipped into the transformer substation because there was no overhead screen nor any other protective device and the current traversed the hose of the co-employee down into a common metal paint pot from which a hose attached to plaintiff's spray gun was connected also.

At first, plaintiff was thought to be dead, but his body was turned over and his tongue released and blood which had filled his oral cavity and one lung gushed out and resuscitation efforts plus lengthy hospitalizations and surgeries saved his life. He sustained numerous permanent disabilities including brain and nerve damage, impaired memory and speech, stomach surgical resection (70% removed) difficulty in retention of urine and feces.

Keith Vagle, who was an employee of Conomos Painting Contractors commenced a third-party subrogation suit against defendant Pickands Mather pursuant to Minnesota Statute 176.061 in the USDC

for Minnesota. Defendant - Appellant Pickands Mather did not join Conomos Painting Contractors as a third party defendant, but pursuant to Minnesota Statute 604.01 and Decision Law and Practice applying Minnesota Statutes 604.01 and 176.061, the trial judge submitted Interrogatories to the jury requiring them to allocate percentages of fault to defendant Pickands Mather, Conomos and plaintiff Vagle. The jury found defendant Pickands Mather to be 37% at fault, Conomos Painting Contractors 60% at fault and plaintiff 3% at fault. The jury fixed damages sustained by plaintiff at $600,000.00. The Trial Court then integrated these findings in accord with Johnson v. Raske Building Systems, Inc., (Minn. Supreme Court 2/16/79), 276 NW 2d 79, and Bjerk v. Universal Engineering Corporation, United States Court of Appeals, Eighth Circuit, decided April 14, 1977, 522 Federal Ref. 2d series 1314 (a Minnesota case) and entered judgment for plaintiff in the amount of $582,000.00 after deducting the 3% of fault allocated by the jury to the plaintiff.

The Trial Court submitted the case to the jury by means of special verdict interrogatories pursutant to invariable practice under Minnesota procedure to effect the provisions of Minnesota Statute 604.01 - Minnesota Comparative Negligence Act and Minnesota Statute 176.061 - Third Party Subrogation Act which returned its verdict as follows:

SPECIAL VERDICT OF THE JURY AS FOLLOWS:

1. Under the theory of negligence, what sum of money will fairly and adequately compensate plaintiff Keith Vagle for his injuries? $600,000

2. Was defendant Pickands Mather negligent: Answer "Yes" or "No". Yes

3. Was such negligence a direct cause of plaintiff's injury? Answer "Yes" or "No". Yes

4. Was John B. Conomos, Inc., negligent? Answer "Yes" or "No". Yes

5. Was such negligence a direct cause of plaintiff's injury? Answer "Yes" or "No". Yes

6. Was plaintiff Keith Vagle negligent? Answer "Yes" or "No". (Answer question 7 only if your answer to question 6 is "Yes".) Yes

7. Was such negligence a direct cause of plaintiff's injury? Answer "Yes" or "No". Yes (C.P.)

8. Taking all of the fault which you have found to be a direct cause of plaintiff's injury as 100%, what percentage do you attribute to:

Defendant Pickands Mather & Co.	37%
John B. Conomos, Inc.	60%
Plaintiff Keith Vagle	3%

It is the jury's intention by virtue of the foregoing, to return a verdict for:

_____the defendant Pickands Mather Company; or

_____the plaintiff Keith Vagle and that he will be awarded $582,000.00.

DATED: 11/4/77

s/Clarence Psyck
FOREMAN OF THE JURY

Judgment was entered by the Trial Court as follows:

11/14/77 41. JUDGMENT, pursuant to SPECIAL JURY VERDICT as follows:

It is ordered and adjudged that plaintiff, Keith Vagle, recover of the defendant, Pickands Mather & Company, the sum of Five Hundred and Eighty-two Thousand & No/100 dollars ($582,000.00), and his costs of action to be taxed.

Ent'd in Judgment Lien Docket C. Page 78.

The opinion of the Circuit Court Panel (8/20/79) instructs the Trial Court to deduct from the above judgment due the plaintiff the sum of $382,000.00 representing the percentage of fault assigned by the answers of the verdict to the employer tort-feasor. This is directly contra the law of Minnesota mandated in Johnson v. Raske, supra, decided 2/16/79.

In that case, the Minnesota Supreme Court ordained at page 81 of the Citation, point (2):

"(2) The correct procedure for apportionment, then, is this: The third-party tort-feasors, here Raske and Ferguson, should pay the ENTIRE verdict ($99,750) to the plaintiff. The employer (Sandberg) should then contribute to the third-party tort-feasor an amount proportionate to its percentage of negligence, but not to exceed the amount of workers' compensation benefits payable to the employee ($41,000.00). The employee (here the plaintiff trustee) should then reimburse the employer pursuant tp §176.061, Subd. 6(c). In the present case this amount of reimbursement equals the amount of workers' compensation benefits paid $41,000), with the result that no money will change hands."

"A jury, by special verdict, set damages in the wrongful death action at $105,000, and found plaintiff's decedent 5-percent negligent, employer Sandberg 40-percent negligent, and general contractors Raske and Ferguson 55-percent negligent." P. 80

"The sole issue on appeal is the appropriate apportionment of these damages among the parties. Where the employer who has paid workers' compensation benefits and a third-party are both negligent, the apportionment of damages is controlled by Minn. St. 176.061, Subd. 6, and our decision in Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W. 2d 679 (1977)." P. 80

Defendant Pickands Mather appealed to the Circuit Court alleging eight grounds for reversal but not attacking the verdict or judgment because of the inclusion of the employer - tort-feasor's fault as a factor therein. A panel of three judges (none from Minnesota) heard oral argument on January 11, 1979, and handed down an opinion on August 20, 1979, rejecting all of defendant's claims of error but sua sponte rejecting the above quoted rule established by the Minnesota Supreme Court in effectuating the provisions of the above cited Statutes, i.e., Minnesota Statute §604.01 and Minnesota Statute §176.061.

The Circuit Court enunciated the new idiocyncratic rule in opposition to the Minnesota Case Law and Statutes whereby it held that plaintiff's damages should be diminished by the amount of fault apportioned by the jury to plaintiff's employer as tort-feasor in answer to the special interrogatories of the verdict.

Thereupon, plaintiff petitioned the Circuit Court for a hearing en banc and without filing an opinion relating to a rehearing the Clerk of said Court on 9/17/79 forwarded the Clerk of the District Court an order directing the entry of judgment in the District Court in accord with the decision of the three-judge panel opinion of 8/20/79, modifying the judgment of the Trial Court entered 11/4/77.

REASONS FOR GRANTING THIS WRIT

1. The decision of McMillian, Van Sickle and Ross overturns the case of Erie v. Tompkins, 304 U.S. 64, 58, S.C. 817 which provides that the law of the state where the Trial Court sits shall be applied in diversity cases and resurrects Swift v. Tyson, 10 L. Ed. 865, 16 Pet. 1, 18, discredited doctrine of a general common law rule for the federal court system.

2. The decision of the three judge Panel emasculates Minnesota Statute 604.01, the comparative negligence Statute of the State of Minnesota as construed by the Minnesota Supreme Court and enforces a different result because the case was litigated in the USDC than the result which would result if litigated in a Minnesota Court.

3. The effect of the three-judge panel decision, due to its omission to address construction and application of Minnesota Statute 176.061 which regulates the distribution of proceeds derived from a third party subrogation action destroys almost totally appellee's (plaintiff's) right to recovery in the instant action if and when plaintiff's right would be ultimately correlated with and adjusted to his rights under the Workers' Compensation Statute of Minnesota.

4. The decision of the three-judge Panel confiscates the cause of action of appellee (plaintiff) established by Minnesota Statute 176.061 under the particular facts of his case and violates the due process and equal protection clauses of the 14th Amendment of the United States Constitution and the 10th Amendment as commented on in Erie, supra.

5. The Circuit Court's failure to cite and discuss Johnson v. Raske Building Systems, Inc., Supreme Court of Minnesota decided February 16, 1979, ___Minn.___, 276 NW 2d 79, over 7 months before the date of its opinion (8/20/79) in this case denies appellee procedural due process and equal protection since the Johnson decision definitely declared with utmost specificity the precise formula to be applied by the Trial Court in entering judgment upon a verdict rendered in a third party subrogation suit under Minnesota Statute 176.061 and concurrent application of Minnesota Statute 604.01 in integrating the verdict into the judgment. The Johnson case is nearly on all 4 points to the instant case as determined by the Minnesota Supreme Court. The decision of the Trial Court herein is in exact accord with the requirements of the Johnson decision, supra.

6. Respondent (appellant-defendant) did not dispute the format nor the content of the special interrogatory jury verdict form submitted by the Trial Court nor the judgment entered pursuant thereto and did not urge either as error at any time before the trial nor Circuit Court and inferentially admitted their correctness in its answer to plaintiff's Petition for Rehearing en banc before the full Circuit Court. Respondent's counsel practices law in Minnesota.

7. The Circuit Court does not have jurisdiction to repudiate the United States Supreme Court decision of Erie v. Tompkins, supra, in favor of even the most profound attachment to the rejected doctrine of Swift v. Tyson, supra, and other rules contra to Minnesota law.

8. The decision of the three-judge panel 8/20/79 overturns the universal interpretation of all Minnesota Trial Courts, both State and

Federal as to Minnesota Statute 604.01 and 176.061 and Decisions of the Supreme Court of Minnesota on joint and several tort liability and contribution.

9. The opinion of Justice McMillian contrives an esoteric and artifical bifurcation of the contribution and indemnity problem (among tort-feasors ascending out of the principles of joint and several liability) from those relating mediately to the plaintiff's rights against all of the third-party tort-feasors under Minnesota Statute 176.061 for the purpose of

(a) rationalizing a repudiation of the specific instructions of the Minnesota Supreme Court regulating the distribution of proceeds received in an action under Minnesota Statute 176.061, and even though;

(b) contribution among joint tort-feasors cannot arise in a third-party subrogation claim unless plaintiff received his total damages (representing damages resulting NOT ONLY from the fault of the third-party tort-feasor but ALSO from the employer as a tort-feasor). If plaintiff does not receive full damages including those attributable to the fault of the employer tort-feasor, the third-party tort-feasor couldn't have any right of contribution over against the employer tort-feasor.

(c) Subordinates plaintiff's primary rights under Minnesota Statute 176.061 to one tort-feasor's contingent claim of contribution v. another without even examining the Minnesota Statute 176.061 regulating the principle and the Minnesota Decisions promulgating the method. Johnson, Lambertson, supra or its own prior decision, Bjerk, supra.

10. The decision of the Circuit Court is in direct conflict with Lambertson and Johnson, supra, and with its own recent interpretation of the Minnesota law in this predecessor decision Bjerk v. Universal Engineering Corporation v. Thorsen decided April 14, 1977, 552 FR 2d 1314 wherein it approved the Minnesota Rule as applied by a Judge of the Eighth Circuit Court of Appeals acting as a trial Judge in the State of Minnesota (he was also a Minnesota resident and former practicing attorney in Minnesota) without adverting to said predecessor decision.

CONCLUSION

The opinion of the Court of Appeals is so transparently erroneous as to allow for its being summarily reversed.

Because of the serious nature of the Court of Appeals' actions, which rejects application of the Erie rule in this diversity case, the grant of this Petition for Certiorari is the only method to achieve the fair goal of justice. Furthermore, because the decision rendered by the Court of Appeals is so glaringly erroneous, in light of the facts of this case, a summary reversal in an appropriate remedy available to this Court. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976); O'Keefe v. Smith Hindkman & Gryll Associates, Inc., 380 U.S. 359 (1965); United States ex rel Robinson v. Solinston, 316 U.S. 649 (1942).

The decision by the three-judge Panel of the Circuit Court resurrects the repudiated rule of Swift v. Tyson, 16 Pet. 1, 18, 10 L. Ed. 865 and the evil which Erie v. Tompkins corrected until the Vagle opinion herein. The Circuit Court Vagle decision establishes a different rule and different

consequences to the same set of circumstances dependent upon whether the case is sued in the State OR the Federal Court.

Judge Brnadeis said at page 319 of the Erie case: "The purpose of the section (725 of Title 28 USC) was. . .to make certain. . . the Federal Courts exercising jurisdiction in diversity of citizenship cases would apply as their rule of decision the law of the state, unwritten as well as written," and

At page 822:

"But the UNCONSTITUTIONALITY of the course pursued following the doctrine of Swift v. Tyson has now been made clear, and compels us to do so." (Reverse Swift v. Tyson by the Erie decision) and

At page 823:

. . ."The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendential body of law outside of any particular State but obligatory within it unless and until changed by statute,' the federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law.'"

"But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

"The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature of its Supreme Court) should utter the last word."

The decision of the Eighth Circuit Court in the instant matter resuscitating Swift v. Tyson should not be indulged. If Erie is to be overruled and Swift restored, that is the sole perrogative of the Supreme Court.

Dated this 9th day of November, 1979.

Paul J. Louisell

PAUL J. LOUISELL, LTD.
Attorney for Petitioner
610 Alworth Building
Duluth, MN 55802
218/722-2621

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1569

Keith Vagle, Appellee,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota
Pickands Mather & Co., Appellant.	*	

Submitted: January 11, 1979

Filed: August 20, 1979

Before ROSS and McMILLIAN, Circuit Judges, and VAN SICKEL, * District Judge.

McMILLIAN, Circuit Judge.

Appellant, Pickands Mather, appeals from a jury verdict of $582,000 in favor of appellee, Keith Vagle, on Vagle's personal injury claim.

---

*The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota, sitting by designation.

For reversal appellant argues that the district court erred (1) in instructing the jury that Pickands Mather was vicariously liable for the negligence of Conomos, the independent contractor and appellee's employer; (2) in holding, as a matter of law, that as managing agent of Erie Properties, Pickands Mather was liable for torts committed by Erie employees; (3) in instructing the jury that appellant had a duty to warn appellee of the electrical substation; (4) in admitting into evidence OSHA Regulations as a guide on the standard of care; and (5) in failing to rule that the jury's award of damages was excessive. We agree with appellant that the court improperly instructed the jury that it was vicariously liable for negligence on the part of Conomos and reverse on that basis.

Appellant, Pickands Mather & Company, is a Delaware corporation with its principal place of business in Ohio. It is the "Managing Agent" of Erie Mining Company, a Minnesota corporation which mines taconite at Hoyt Lakes, Minnesota. John B. Conomos Painting Contractors (Conomos) is a Pennsylvania corporation engaged primarily in providing industrial painting services for industrial businesses. At the time of the accident, Conomos had contracted to paint the exterior of the Erie Mining Plant at Hoyt Lakes. Appellee, Keith Vagle, was a painter employed by Conomos.

On September 5, 1973, Vagle and a co-worker, Tom Henderson, were standing on a scaffold at Erie's Hoyt Lakes property spray-painting a steel bridge which runs parallel to and within a few feet of an electrical transformer substation. As Henderson attempted to unplug his spray gun the hoses attached to his spray gun touched the "live" portion of

the electrical substation and the electrical charge from the 13,800 volt substation knocked both painters to the ground. As a result of the accident Vagle lost 70% of his stomach and developed a speech impairment due to persisting neurological defects, suffering a total disability of 25%.

Although Pickands Mather was the only defendant, the jury was instructed to determine the comparative negligence of Conomos, Pickands Mather and Vagle. Vagle argued that Conomos negligently failed to make proper arrangements to guard and protect its employees from exposure to electrocution and that Pickands Mather negligently failed to warn Vagle and his co-workers of the danger, failed to guard and protect the transformer, and failed to shut off the transformer. The jury found that Conomos was 60% negligent, Pickands Mather 37% negligent and Vagle 3% negligent. It further found that Vagle was entitled to $600,000 damages, reduced by 3%, for a total judgment of $582,000.00.

Appellant's first claim of error is that the trial court improperly gave, as jury instructions, §§ 414, 416, 422 and 427 of Second Restatement of Torts, which confer vicarious liability on Pickands Mather for Conomos' negligence. These Restatement sections confer liability on "one who entrusts work to an independent contractor" for negligence on the part of the independent contractor. Appellant argues that these instructions were improperly given because the employee of an independent contractor is not within the group of persons intended to be protected by the Restatement. We agree.

In this diversity case Minnesota law governs. The Minnesota Workmen's Compensation Statute provides that an employee who is

covered by workmen's compensation and who is injured "under circumstances which create a legal liability for damages" on the part of a third party, cannot collect workmen's compensation and also sue the third party if the third party and the employee's employer are engaged in a "common enterprise." Minn. Stat. Ann. § 176.061 subd. 1 (West) (emphasis added). If, however, the employer and the third party are not engaged in a common enterprise, the employee may bring suit against the third party while also receiving workmen's compensation. Thus, two questions must be answered to determine if Vagle, who collected workmen's compensation from Conomos, may bring a suit against Pickands Mather: first, is Pickands Mather "legally liable" to Vagle, and second, if Pickands Mather is legally liable, is it immune from suit because it was engaged in a common enterprise with Conomos?

The jury was instructed that Pickands Mather could be found liable in two ways: first, directly liable for its own negligence. Minnesota courts have held that the employer of an independent contractor can be held directly liable to an employee of an independent contractor for its own negligence. E. I. DuPont De Nemours & Co. v. Frechetle, 161 F. 2d 318 (8th Cir. 1947). However, the Minnesota courts have not decided whether the employer of an independent contractor can be held vicariously liable to an employee of the independent contractor for negligence on the part of the independent contractor.

Generally, the employer of an independent contractor is not liable to third parties for the independent contractor's negligence. Cf. King v. Shelby Rural Electric Cooperative

Corp., 502 S.W. 2d 659 (Ky. 1973), cert. denied, 417 U.S. 932 (1974). There are exceptions to this rule, however, such as where the employer of the independent contractor retains control over the independent contractor's work, e.g., Thill v. Modern Erecting Co., 272 Minn. 217, 136 N.W. 2d 677, 684 (1965), and where the independent contractor is engaged in Corp., 422 F. 2d 610 (10th Cir. 1970). "The reason for this (latter) exception to the general rule of nonliability of an employer for the negligence of his independent contractor seems to be that the duty of due care owing to third persons in the performance of extra-hazardous work should, as a matter of public policy, be nondelegable." Id. at 614.

Although the Minnesota courts have not ruled on the question of whether the liability owed to third persons by an employer of an independent contractor for the negligence of the independent contractor extends to employees of the independent contractor, numerous other courts have. In so doing, they have held that this vicarious liability does not extend to employees of an independent contractor. Parsons v. Amerada Hess Corp., supra, 422 F 2d at 614; Lipka v. United States, 369 F. 2d 288, 292-93 (2d Cir. 1966), cert. denied, 387 U.S. 935 (1967); Sloan v. Atlantic Richfield Co., 552 P. 2d 157, 160 (Alas. 1976); Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P. 2d 330, 339 (1965); Florida Power & Light Co. v. Price, 170 So. 2d 293, 298 (Fla. 1964); King v. Shelby Rural Electric Cooperative Corp., supra, 502 S.W. 2d at 661-663; Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 189 A. 2d 271, 277 (Pa. 1963); Humphreys v. Texas Power & Light Co., 427 S.W. 2d 324, 330-31 (Tex. Civ. App. 1968); Epperly v. City of Seattle, 65 Wash. 2d 777, 399 P. 2d 591,

597 (1965). Contra Van Arsdale v. Hollinger, 68 Cal. 2d 245, 66 Cal. Rptr. 20, 437 P. 2d 508, 514 (banc 1968); Giarratano v. Weitz Co., 259 Iowa 1292, 147 N.W. 2d 824, 834 (1967); Mallory v. Louisiana Pure Ice & Supply Co., 320 Mo. 95, 6 S.W. 2d 617, 624 (banc 1928); International Harvester Co. v. Sartain, 32 Tenn. App. 425, 222 S.W. 2d 854, 868 (1948).

There are several policy reasons supporting this view. First, the employer of the independent contractor has in effect paid the workmen's compensation premiums for the employees of the independent contractor because this expense is included in the fee charge by the independent contractor for its services. Olson v. Kilstofte & Vosejpka, Inc., 327 F. Supp. 583, 588 (D. Minn. 1971), aff'd sub nom. Olson v. Red Wing Shoe Co., 456 F. 2d 1299 (8th Cir. 1972); Sloan v. Atlantic Richfield Co., supra, 552 P. 2d at 159. Therefore the rule that an employee who collects workmen's compensation from his immediate employer does not have a common law right of action against that employer should also apply to the independent contractor's employer.

The second policy reason follows from the first. If the employer of an independent contractor is held vicariously liable to employees of the independent contractor, that entity, because it has in effect paid for workmen's compensation and is still liable in common law, has a greater liability to the employees of the independent contractor than it does to its own employees. Cochran v. International Harvester, supra, 502 S.W. 2d at 663. By the same token, such a policy would create an unwarranted windfall for those employees who happen to be working for an independent contractor.

The last policy reason is that the rationale supporting imposition of vicarious liability to third persons on one who hires an independent contractor for hazardous work is inapplicable when the third person is an employee of the independent contractor. The rule originated to prevent one from contracting out such work to an independent contractor and thereby escaping the responsibility to the public and adjoining property owners of dangers inherent in hazardous activities. However, the liability of one who hires an independent contractor with employees specialized in the hazardous work should not be penalized by being held vicariously liable in common law. Olson v. Kilstofte & Vosejpka, Inc., supra, 327 F. Supp. at 588; Welker v. Kennecott Copper Co., supra, 403 P. 2d at 339.

The cases cited by appellee as holding that the employer of an independent contractor can be held liable to employees of the independent contractor for the independent contractor's negligence do not so hold. Most of the cases cited by appellee acknowledged that an employee had a common law right of action against a third person in addition to workmen's compensation benefits but the third person sued was not the employer of the plaintiff's employer and thus none of the above policy issues arose. E.g., Lambertson v. Cincinnati Corp., 257 N.W. 2d 679 (Minn. 1977); Sorenson v. Safety Flare Inc., 298 Minn. 353, 216 N.W. 2d 859 (1974); Hillman v. Wallin, 298 Minn. 346, 215 N.W. 2d 810 (1974); Haney v. International Harvester Co., 294 Minn. 375, 201 N.W. 2d 140 (1972); Froysland v. Leef Bros., 293 Minn. 201, 197 N.W. 2d 656 (1972). In the one instance cited by appellee where the employee of a subcontractor sued the general contractor which had hired the subcontractor, the issue on appeal concerned only the contractor's right of indemnification

from the subcontractor; the propriety of the subcontractor's employee recovering from the general contractor never arose. Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 193 N.W. 2d 305, 307 (1971).

Thus we have answered the first question necessary to determine if Vagle can recover from Pickands Mather, i.e., the extent of Pickands Mather's legal liability to Vagle. As detailed above, Pickands Mather is not vicariously liable to Vagle for Conomos' negligence but is directly liable for its own negligence.

The second question we must address is whether Pickands Mather is immune from suit. If Pickands Mather and Conomos, Vagle's employer, are engaged in a "common enterprise," Pickands Mather is immune from suit. However, this is clearly not the case. Merely making repairs on the third party's premises does not make the third party and the employer of the injured employee "engaged in a common enterprise." Chenette v. Trustees of Iowa College, Grinell, Iowa, 43] F. 2d 49, 53 (8th Cir. 1970); Gleason v. Geary, 214 Minn. 499, 8 N.W. 2d 808, 811 (1943). To find a common enterprise the employees of the two employers must be engaged in the same project and exposed to the same or similar hazards. Id. at 812. This is clearly not the case, for no Pickands Mather or Erie employees were assisting in the painting or in any way exposed to the danger of electrocution. Therefore, Conomos and Pickands Mather are not engaged in a common enterprise and Pickands Mather is not immune from suit for its own negligence.

In conclusion, we agree with appellant's first point of error; appellant should not

have been held vicariously liable for Conomos' negligence.

Appellant's second point of error is that the trial court erred in holding, as a matter of law, that Pickands Mather was liable for activities of Erie employees which may have caused the accident. As stated, Erie Mining Company, owner of the premises on which the accident occurred, hired Pickands Mather as managing agent of its enterprises including management of its Hoyt Lakes property. At the time of Vagle's accident, Erie had 2,900 employees at this site while Pickands Mather had four, all of whom were top level management personnel. Appellant has spent considerable time attempting to argue, under agency principles of law, why Erie, rather than Pickands Mather, is liable in this case[1], and why the court erred in failing to submit the issue of agency to the jury. The liability of appellant, however, does not rest upon agency theory. Instead, it rests on the clear and concise contract in which Erie and Pickands Mather delineated their responsibilities. Cf. Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N.W. 698 (1883) (a mill company was renting land and was under obligation with the owner of property to maintain a bridge; when

---

[1]In arguing this point, appellant has submitted the following cases as supporting its position that it is not liable: Towt v. Pope, 168 Cal. App. 2d 351, 336 P. 2d 276 (1959); Malloy v. Fong, 37 Cal. 2d 356, 232 P. 2d 241 (1951); Morgan v. Eaton's Dude Ranch, 307 Minn. 280, 239 N.W. 2d 761 (1976). These cases are not apropos. As the district court pointed out, they all involve the responsibility of a corporate officer rather than the

the bridge collapsed because of negligent repair, the mill owners were liable pursuant to an agreement between the owner of the property and the mill company).

The agreement between the parties provided:

Among the things to be managed and supervised by the Manager (Pickands Mather) are . . .

> the maintenance and protection of the Taconite Properties, . . .
>
> the securing of adequate and reasonable insurance covering risks growing out of personal injury to, or death of, employees and others, risk of fire and other risks ordinarily insured against . . .
>
> (the) compliance with all laws including laws relating to . . . safety requirements . . .
>
> the doing of all such acts and things and the conducting of all such operations as may be necessary or advisable for the efficient and economical operation and care of the Taconite properties . . .

In other words, the contract specifies that Pickands Mather is responsible for maintenance of the Taconite properties,

---

1 continued
responsibility of a corporate entity. Their lack of applicability is exacerbated even further by the fact that in this case a contract spells out the corporate entity's responsibility.

for compliance with all safety regulations and for securing insurance coverage for "employees and others" who are injured. It is thus apparent that the contract between Erie and Pickands Mather specifies that the latter is liable for damages resulting from a failure to comply with safety regulations. Because it is well-established that construction of an unambiguous writing is for the court, Cut Price Super Markets v. Kingpin Foods, Inc., 256 Minn. 339, 98 N.W. 2d 257, 267 (1959), and because this contract is unambiguous, the trial court acted quite properly in construing Pickands Mather's contractual responsibilities itself rather than submitting the particularities of the relationship between Erie and Pickands Mather to the jury.

A third issue which appellant has raised is whether the trial court erred in instructing the jury that Pickands Mather had a duty to warn Vagle of dangers inherent in the painting project. Appellant advances two arguments: (1) the trial court erred in instructing the jury that Pickands Mather had a duty to warn Vagle directly and, according to appellant, the court should have instructed the jury that Pickands Mather was only required to warn Conomos; and (2) alternatively, the trial court should have instructed the jury that Pickands Mather had no duty to warn of an obvious danger, which appellant claims the substation was.

The court instructed the jury that:

> A possessor of land has a duty to use reasonable care to inspect and repair his premises or to warn an entrant who comes upon his premises to protect the entrant from an unreasonable risk of harm caused by the condition of the

> premises while he is on the premises.

Appellant's first argument has no basis in fact. The court did not, as appellant argues, instruct the jury that Pickands Mather had a duty to warn Vagle directly. The court merely told the jury Pickands Mather had a duty to use "reasonable care" to warn an entrant, which Vagle was. The jury could well have found, just as appellant urges, that reasonable care required only that Pickands Mather warn Conomos, which would then warn its individual employees. Given this ambiguity and the fact that Minnesota law is unclear on this subject, we cannot say the court's instructions on appellant's duty to warn were clearly erroneous or prejudicial to the point of requiring a new trial on this basis.

Appellant's second argument, that it had no duty to warn of an obvious danger, is also flawed. While it is true that the owner or possessor of premises has no duty to warn of obvious dangers, Minnesota courts have recognized that the duty to warn remains if the danger, however, obvious, cannot be avoided. Peterson v. W. T. Rawleigh Co., 274 Minn. 495, 144 N.W. 2d 555, 558 (Minn. 1966). As the trial court properly found, Vagle and Henderson were to paint the bridge directly over the substation and could not avoid the danger presented. Therefore appellant's duty to warn of the substation, assuming arguendo it was an "obvious danger," did not abate.

Appellant has also argued that the trial court erred in allowing into evidence Vagle's Exhibit 26 which consisted of an Occupational Safety & Health Administration (OSHA) Safety Regulation regarding electrical installations on a jobsite. According to appellant,

because Hoyt Lakes is a mining facility, the Mining Enforcement and Safety Administration (MESA) is the appropriate regulating authority and MESA regulations, not OSHA regulations, apply. Appellant argues that the trial court committed reversible error in allowing into evidence the OSHA regulations. Because the OSHA regulations apply to electrical sub-stations and because it is unclear to us whether the bridge Vagle and Henderson were painting was a "mine" and thus actually regulated by MESA rather than OSHA, we cannot say that the trial court erred in allowing the OSHA regulations into evidence.

Appellant challenged the amount of damages, arguing that the calculations of Vagle's anticipated income by Vagle's expert witness, Professor Karl Egge, were suspect because they exceeded Vagle's actual earnings in the year previous to the accident. We cannot agree that this renders Egge's calculations erroneous. Vagle was twenty-four years old at the time of the accident and spent the year previous to the accident attending scuba diving school, working off and on to finance his educational expenses and, in general, considering his career options. His earnings during such a transition period are scarcely reflective of what his earnings in future years will be. Therefore, Professor Egge's calculations of Vagle's anticipated earnings based on the assumption Vagle would remain at a construction job comparable to the one he held when injured are not inappropriate.

In conclusion, we agree with appellant on only one point; the trial court erred in submitting as jury instructions §§ 414, 416, 422 and 427 of the Second Restatement of Torts, which conferred vicarious liability on

Pickands Mather for Conomos' negligence. On this basis we vacate the judgment of $582,000 against appellant and remand for the entry of judgment in the amount of $222,000. This is $600,000, the amount of damages to which the jury determined Vagle was entitled, less 3% for Vagle's contributory negligence, and less 60% for Conomos' negligence.

A true copy.

ATTEST: Robert C. Tucker

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

KEITH VAGLE,	)	
	)	
PLAINTIFF,	)	Civ. 5-75-40
	)	
VS.	)	
	)	
PICKANDS MATHER & CO.,	)	MEMORANDUM AND
	)	ORDER
DEFENDANT.	)	

Paul J. Louisell, Ltd., Suite 610 Alworth Building, Duluth, MN 55802.

Gene W. Halverson, Halverson Watters Bye & Downs, Ltd., 700 Providence Building, Duluth, MN 55802.

This suit was brought by Keith Vagle, a painter injured on the job, against Pickands Mather & Co. Defendant Pickands Mather & Co. is the managing corporation which hired Vagle's employer, a painting subcontractor, to do various tasks at the Erie Mining Co. facility at Hoyt Lakes, Minnesota.

While painting an electrical substation, Vagle sustained a jolt of high voltage electricity when the spray gun of a companion painter touched an exposed transformer. As a result, Vagle fell from the painting platform suspended above the substation. Evidence adduced at trial showed that Vagle has lost 70 percent of his stomach, has impaired speech because of persisting neurological defects, and has a

25 percent permanent partial disability of whole person. He claimed a loss of $50,923 in earnings from the date of the accident, in September of 1973, to the date of trial, and suffered medical costs of $30,000.00.

The jury found Pickands Mather liable and awarded plaintiff a sum of $600,000. No special verdict was requested.

The motion of defendant addressed here is in the alternative for a judgment notwithstanding the verdict or for new trial or for remittitur.

Pickands Mather alleged error by the trial judge in ruling that defendant would be directly liable to plaintiff or vicariously liable for any torts of the employees of its principal, Erie Mining Co. It assigns error in the admission as evidence of certain standards promulgated by federal regulatory agencies, in allowing plaintiff a recovery from Pickands Mather beyond the extent of workmen's compensation benefits, and complains that the jury was improperly instructed and its verdict excessive, and influenced both by improper testimony and passion or prejudice. It is also the defendant's contention that Pickands Mather was singled out for suit for the sole purpose of creating federal diversity jurisdiction.

A. Jurisdiction

Turning first to the question of this court's jurisdiction, it is not disputed that Pickands Mather is a resident of Cleveland, Ohio, and that the plaintiff is a resident of Minnesota, who brought suit for an amount in excess of $10,000. These facts indicate that diversity jurisdiction exists, 23 U.S.C. §1332 (1948). That the plaintiff may also have a

claim against Erie Mining Co., a Minnesota corporation, does not destroy jurisdiction here. Furthermore, Pickands Mather could have impleaded Erie Mining Company as a third party defendant without divesting this Court of jurisdiction. Kroger v. Owen Equipment & Erection Co., 558 F. 2d 417 (8th Cir. 1977), cert. granted, 985 S. Ct. 715 (1978) (No. 77-677). It ill bespeaks the defendant, at this time, to complain that Pickands Mather has been singled out for liability vis-a-vis Erie Mining Company when they have failed to join Erie Mining Company and resolve the issue. Both Erie and Pickands Mather are insured by the same carrier.

B. The agency relationship and the question of liability -- direct or vicarious -- for Pickands Mather

Pickands Mather contends that the court erred in instructing the jury that the defendant had vicarious liability for any of the activities of Erie Mining Co. on the theory that the initial agency relationship in turn created a separate agency in which Pickands Mather became the principal for Erie for the purpose of carrying on the operations here in questions.

Pickands Mather also contends that although its contract with Erie was admitted as evidence, certain other information, documents and testimony concerning the relation of Pickands Mather and Erie should have been allowed to be presented to the jury, which could have exonerated Pickands Mather from any liability -- vicarious or direct.

A look first at the Amended Erie Management Agreement between Erie Mining Company and

the defendant, Pickands Mather & Co., dated January 1, 1953, discloses why there is no error. Repeatedly throughout its contract, Pickands Mather undertakes to "manage and supervise" the operation of the Erie properties. Article III of the contract spells out that the mining of iron ore, as well as "(7) the maintenance and protection of the Taconite Properties" of the Erie company were among things specifically under management and supervision by the defendant.

Even though Pickands Mather may not have been responsible for the placement of the hazard in the first instance, by virtue of its contractual undertakings and negligent performance of its contract duties, it is clear that a duty of care has arisen. Zylka v. Leikvoll, 144 N.W. 358 2d (1966). There is sufficient support in the record, therefore, upon which the jury could be instructed as a matter of law that Pickands Mather was liable if it negligently breached its contract duty of reasonable care in supervision of Erie properties at the Hoyt Lakes plant.

Furthermore, the fact that Erie Mining Company as owner may be exposed to liability as a result of this incident does not relieve Pickands Mather of liability. The amended agreement between plaintiff and defendant expressly declares at Article III that the defendant will manage and supervise "but subject to the control and direction of the Board of Directors (of Erie) ..." It is settled in Minnesota that the owner of a premises who has not surrendered all control of those premises may be liable for an injury caused by their unsafe and dangerous condition -- even though resulting from the act or negligence of a third person. Yet, the person whose conduct or negligence exposes the owner to liability is

also liable to an action by the injured party at his election. Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N.W. 689 (1883).

Defendants in Minneapolis Mill owned a mill on plaintiff Wheeler's canal. Plaintiff's grantor had already constructed a bridge over the canal at the site of the mill, and plaintiff had given the defendant mill owners a right of way to use and maintain the bridge. The bridge remained in disrepair and an individual was injured while crossing it on a loaded wagon. The court said that although plaintiff's ownership, possession and control remained, and exposed plaintiff to liability for the injuries, defendant mill owners "were also liable because of their agency in maintaining the bridge, and their negligence in not closing or repairing it." 16 N.W. at 699.

In the instant case, Pickands Mather is like the mill owner and indeed characterizes itself by contract as an agent for the purpose of managing property which remains in the ownership of Erie Mining Co., subject to control of its board but in the day-to-day possession and supervision of the defendant. The negligence of Pickands Mather in not enclosing a high-voltage transformer under conditions known to pose an unreasonable risk of harm to those coming on the premises is analagous to the mill owners' negligent failure to close or repair a bridge which posed a threat of harm to users. As between these parties, it was incumbent on Pickands Mather to safeguard the transformer for painters.

Erie was never made a party to this action. Even if Erie had been exposed to liability via impleader, the parties cannot be said to be in pari delicto; thus, as Minneapolis Mall opinion

continues to be cited for this latter proposition, and has been followed by both state supreme courts and federal courts. It was cited most recently by the North Dakota Supreme Court in Sayler v. Holstrom, N.D. , 239 N.W. 2d 276 (1976). See also, Lawrence v. Great Northern Ty. Co., 109 F. Supp. 555 (Minn. 1952); Waylander-Peterson v. Great Northern Ry. Co., 201 F. 2d 416 (1958); Kahler v. Liberty Mutual Ins. Co., 204 F. 2d 807 (1953).

Defendant cites Morgan v. Eaton's Dude Ranch, Minn. , 239 N.W. 2d 761 (1976) for the proposition that it could have no vicarious liability for the omissions or tortious acts of Erie employees.

The case must be distinguished: the defendant who appealed the question of his liability was an officer; the negligence which led to the plaintiff's injuries was that of a corporate employee. The corporation also was held liable by the district court but did not appeal. The rule that a corporate officer may not be held for the torts of corporate employees absent participation, direction or negligent failure to prevent those torts is inapposite to the question here whether there is liability for a managing corporate entity which has assumed a duty of supervising a facility.

C. Did the trial court err in admitting as evidence regulations promulgated by the Occupational Safety and Health Administration?

Defendant objected at trial to the admission in evidence of OSHA regulations in two separate exhibits, 26 and 27.

Pickands Mather urges on review that there

was negligible probative[B7] value to Exhibit 26[1] since it was not enforceable against a mining operation.

---

1. (Plaintiff Exhibit 26 received.)

MR LOUISELL: If the Court please, and members of the Jury, I will only read the most pertinent parts, the parts I deem most pertinent.

And, of course, Mr. Halverson is at liberty to read any other parts to you.

I am reading now from subpart K. Electrical, 1926.400, General Requirements Subdivision C. pargraph 1: "No employer shall permit an employee to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it by effective insulation or other means."

And paragraph 2: "Before work is begun, the employer shall ascertain, by inquiry or direct observation or by instruments, whether any part of an electric power circuit exposed or concealed is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith."

MR. HALVERSON: In view of the fact, Your Honor, that it obviously applies in and is directed towards an employer, and P.M. was not an employer of the plaintiff, I move, I renew my objection and move it be stricken.

Defendant cites a memorandum of agreement between the enforcement[B8] arm of the Department of Interior (Mining Enforcement Safety Administration), MESA, and the regulatory agency for the Department of Labor, OSHA. That agreement limits the jurisdiction of MESA to mines and mills while OSHA has enforcement authority in processes beyond mining and milling. 39 Fed. Reg. 145, July 26, 1974. Therefore defendant argues that MESA regulations and not the OSHA regulations of Exhibit 26 would govern the Erie facility at which Vagle was injured.

The Court, looking to the issue of what would be a reasonable standard of care of a prudent mine managing agent, instructed the jury that the OSHA regulation in Exhibit 26 would be admitted, but would not be binding against a mining operation and could only be looked upon as "a guide ... as to ... whether or not negligence was present."

The overriding concern of a trial court must be to see that the jury has available any and all evidence that would tend to establish a material element in the case. Under Federal Rules of Evidence, Rule 401, 28 U.S.C., evidence is relevant and probative so long as it has a tendency "to make more or less probable" the existence of a fact of consequence in determining the outcome of the case. It is significant that defendant claims only lack of probative value; nowhere does it claim to have been prejudiced by admission of the regulation in Exhibit 26.

It is clear, upon review, that the regulation had probative value for the proposition to which it was director -- the question of negligence in permitting work to be done in proximity to a high-voltage electric circuit, and it is unlikely that the jury was misled,

given the trial judge's cautionery instruction limiting the use of Exhibit 26.

As to Exhibit 27, a group of four OSHA regulations,[2] the ground of objection at trial was irrelevance.

---

2 COURT: Is that the same in the federal code?

MR. HALVERSON: That is, yes.

MR. LOUISELL: "Mandatory," period. "Electrical equipment shall be deenergized before work is done on such equipment. Switches shall be locked down or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Such locks or preventative devices shall be removed only by the persons who installed them or by authorized personnel."

...

THE COURT: Okay.

MR. LOUISELL: The next one says -- which is 55. 12-17: "Mandatory. Power circuits shall be deenergized before work is done on such circuits unless hot line tools are used. Suitable warning signs shall be posted by the individuals who are to do the work. Switches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individual working on them. Such locks, signs or preventative devices shall be removed only by the person who installed them or by authorized personnel."

And then section 55. 12-66. "Mandatory.

Where metallic tools or equipment can come in contact with trolley wires or bare power lines, the lines shall be guarded or deenergized."

And 55. 12-67. "Mandatory. Transformers shall be totally enclosed or shall be placed at least eight feet above the ground or installed in a transformer house or surrounded by a substantial fence at least six feet high and at least three feet from any energized parts, casings, or wires." Period.

MR. HALVERSON: Your Honor, to complete this particular documentation, I would request if we could read the next paragraph which gives the locks on the fence.

COURT: Go ahead.

MR. HALVERSON: 55. 12-68. "Mandatory. Transformer enclosures shall be kept locked against unauthorized entry."

I might explain that one reason there was some confusion was there was another set which came out '74 which had different numbers, so we had to go back to the issue in '73, at the time, to get it straightened out.

...

Plaintiff's counsel obtained Exhibit 27 in booklet form from OSHA offices. It was a series of regulations promulgated in 1971 and still unaltered by the time it was republished in 1974. The accident at issue here occurred in 1973.

Defendant at first objected to the proferring of the exhibit on grounds it was not a

MESA regulation, even though as written it constituted health and safety standards for metal and nonmetallic open pit mines.

But during a trial recess, a defense counsel was able to find assistance at a MESA office, and later told the court:

> Your Honor...we have -- with the use of federal regulations supplied by the MESA office -- compared the language that was in the code revised as of July 1, 1973, with what Mr. Louisell had in his mimeographed document, Exhibit 27 ... And he is and I am satisfied that what he has is identical to what is in the code (of federal regulations).

Thus, defense counsel conceded that the OSHA regulations of Exhibit 27 were identical to the MESA regulations governing the Hoyt Lakes facility. Although defense counsel continued to object to Exhibit 27 on grounds of relevancy, it was received.

Wide discretion is left to the trial court as to whether evidence is relevant or remote. Reene v. Gustafson, 292 Minn. 218, 194 N.W. 2d 267 (1972). Relevancy is largely a matter of logic. As stated in McCormick, Evidence, §185 (2d ed. 1972):

> ... Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove.

The regulations admitted in evidence were identical to a MESA standard for mining operations. The nature of the facts in relation to which this evidence was offered -- an accidental contact of a metallic hose

connected to a spray gun with an exposed transformer -- makes it clear that there was no abuse of the court's discretion. Defense counsel has not established grounds for a new trial or reversal of the verdict. Defendant could not have been prejudiced in any substantial way by the admission of such evidence.

Moreover, the plaintiff is right in stating that it would only serve to undermine the flexibility of the New Federal Rules of Evidence to find error in the discretionary admission of these exhibits. As Judge Wisdom put it in a case that was a forerunner to the new Federal Rules of Evidence: "...if they are worth their salt, evidentiary rules are to aid the search for truth." Dallas County v. Commercial Union Assurance Co., 386 F. 2d 388, 395 (1961).

Thus, the evidence in both exhibits was legally relevant to the question of negligence and properly admitted without prejudice to the defendant.

D. Was it error to instruct the jury pursuant to Restatement of the Law, Torts, 2d, §§ 414, 416, 422 and 427?[3]

---

3 The above cited Restatement (Second) of Torts read as follows:

> §414 Negligence in Exercising Control Retained by Employer
>
> One who entrusts work to an independent contractor, but who

retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

§416 Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions in the contract or otherwise.

§422 Work on Buildings and other Structures on Land

A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure

(a) while the possessor has retained possession of the land during the progress of the work, or

(b) after he has resumed possession of the land upon its completion.

§427 Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Defendant urges the above sections of the Restatement were not meant to enumerate duties owed to employees of independent contractors.

Reliance is placed on Olson v. Kilstofte and Vosejpka, Inc., 327 F. Supp. 583 (D. Minn. 1971), aff'd 456 F. 2d 1299 (8th Cir. 1972), an action by a bricklayer employed by an independant contractor and injured when the wall under construction by the independent contractor on the defendant's land collapsed.

The case must be distinguished first on its facts. The dangers that produced injuries to the plaintiff bricklayer in that case were the result of the negligent performance of the contracted work. Judge Neville in his opinion

for the U.S. District Court expressly noted that the danger was not the result of a condition on the land, but was rather created in the process of building a brick wall.

In contrast, the painting in which Vagle was engaged did not create the exposure to the accident and injuries herein suffered. Vagle was injured while painting above an exposed 13,800 volt electrical transformer already on the premises managed by the defendant. The danger was the result of the pre-existing condition of the land and was not created by Vagle or his employer in the process of painting.

Defendant urges the court to set a policy which Judge Neville rightly declined to set; he expressly declared in Olson at 327 F. Supp. 588 that the question must be left to the Minnesota Supreme Court whether to adopt the broad policy that employees of independent contractors not be included among those to whom a duty is owed by a contractee to take precautions required by the nature of the work in which the independent contractor is engaged. This policy would be inapposite in this case where danger is not inherent in the painting in which plaintiff was engaged.

Further, this court is not persuaded of the soundness of so broad a policy on the facts of this case. The danger involved was upon the land managed by Pickands Mather; it was in the best position to inspect and enclose the transformer. The expertise of painters and painting contractors does not make them the best inspectors of live transformers on the grounds of a mining operation.

Defendant next urges that the extensive duties set down by the Restatement sections in

questions are owed by landowners to innocent injured persons -- that the duty does not rest on a managing agent. But this argument ignores the clear statement in the Olson opinion:

> ...the above quoted sections of the Restatement (do) not involve actual negligence on the part of the (land) owner ...

Defendant ignores the obligations of the Restatement upon the employer of the independent contractor, when the employer is negligent as to work which is dangerous in the absence of precautions.

Defendant misinterprets the Olson court; clearly it was concerned only with whether a landowner should be called upon to supervise work which in its progress inherently creates risk of physical harm to others. The instant case is not a suit against the landowner; it is one where the risk was in existence on land managed by defendant before the work of the plaintiff was ever in progress.

E. Was it error to not instruct that the danger was open and obvious?

Defendant claims the court erred in not instructing that the danger was open and obvious, within § 343A of the Restatement (Second) of Torts.

The American Law Institute in that section has stated the general rule that a possessor of land is not liable to his invitees for physical harm caused to them by any condition on the land if the danger is known and

obvious to those invitees.

That, however, is certainly not a fixed rule. Prosser, Law of Torts (4th Ed. 1971), annotated a group of cases that establish some exceptions where the condition is one

> which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases, ... obviousness, warning or even knowledge is not enough ... (T)he obligation as to the condition of the premises is of such importance that it cannot be delegated, and that the occupier will be liable for the negligence of an independent contractor to whom he entrusts maintenance and repair.

Minnesota has recognized the exception for such unavoidable hazards. Peterson v. W.T. Rawleigh Co., 274 Minn. 495, 144 N.W. 2d 555 (1966); Corrigan v. Elsinger, 81 Minn. 42, 83 N.W. 492 (1900).

The job of the plaintiff of necessity required him to be on a plank directly above a 13,800 volt electrical generating unit with an open top, exposing him to numerous electrical contacts. The obviousness of the danger is not significant given a jury finding that Pickands Mather failed to direct anyone to act and failed to act itself to lessen the extra-ordinary hazard, regardless of whether it was open and obvious.

The jury was entitled to conclude from evidence that regular employees of Erie

Mining Company performed all of the routine and safe maintenance tasks, including the painting of the premises, and that these employees were under the supervision of Pickands Mather. They were also authorized to conclude that only the very hazardous and difficult tasks were assigned to subcontractors, on the theory that the subcontractors had greater expertise in these subtasks. Pickands Mather allowed a young and inexperienced workman to place himself in a tremendously perilous position, painting over the tops of transformers which were known by the defendant to carry high voltage and to present grave dangers to anyone in their vicinity. The extent that defendant "farmed out" such work, one might infer its knowledge of the dangerous condition thereof, and its concommitant duties and responsibilities.

F. Will plaintiff's common law recovery from Pickands Mather subvert the Workmen's Compensation system in Minnesota?

Defendant urges this court that had plaintiff been in the employ of Pickands Mather, his sole remedy would have been under the Workmen's Compensation Act, Minn. St. 176.021 et seq. Defendant points to other courts which have refused to grant third party benefits to an employee injured on-the-job and who can collect workmen's compensation.

Defendant's theory is clearly not the rule in Minnesota. To the extent that a third party has caused an injury, the afflicted employee may collect not only full workmen's compensation benefits but also a common-law recovery from that third party. Minn. St. 176.061 (West 1953), construed in Lambertson v. Cincinnati Corp.,

Minn. , N.W. 2d , Opinion No. 156 (1977). The Minnesota Supreme Court has correctly recognized the equity in allowing a full common-law recovery against a third party who is "not subject to the benefits and burdens of the workmen's compensation system."

Defendant again cites us to Olson, supra, on this issue. However, Judge Neville in that opinion was concerned that allowing recovery against a landowner by an employee of an independent contractor would make an illusion of the rule that there is no liability for the landowner for the negligence of an independent contractor. We emphasize again that Pickands Mather, the defendant, is not the landowner of the premises involved in this case. Thus, there is no question of non-delegable duties of a landowner involved in this case and no risk of blurring the two separate legal entities, landowner and independent contractor.

G. Was the verdict excessive?

Defendant maintains that the evidence did not support testimony of plaintiff's expert, Professor Egge, that wage loss from the date of plaintiff's accident to the trial would amount to approximately $12,000 per year, or a sum of $50,922 in the four year pre-trial period.

However, the defendant itself calculates from the evidence of wages earned at the Erie plant site by the plaintiff that he was earning the equivalent of $300 per week, or an annual sum of more than $15,000.

The defendant seeks to rely on evidence that plaintiff's employer ceased work at the Erie plant within weeks of the accident.

That does not establish that plaintiff would not have continued to work at the same wage, if on a different project.

Over objection, Professor Egge gave testimony showing the average monthly salary in five construction trades -- painting, carpentry, general labor, trade helpers and equipment operations -- to be $1,182 per month. The plaintiff's expert then testified that after the injury, Vagle could engage in six types of non-construction jobs, at an average monthly salary which would be reduced by $325 or $3,900 per year, based on 1977 wage levels.

None of these calculations was unfair to defendant nor irrelevant to the question of the extent of impairment of plaintiff's earning capacity in the construction trades.

Actual earnings in any one year and earning expectancy are not synonymous. The plaintiff prior to injury was capable of pursuing certain gainful employment and post-injury is deprived of the option to pursue the same or similar employment in the construction trades. It is only based upon such evidence that a jury can proceed, as mandated by Hallada v. Great Northern Ry., 244 Minn. 81, 69 N.W. 2d 673 (1955), to calculate "what the plaintiff normally would have earned during the rest of his life had he not been injured," and then to deduct "a sum which he may reasonably by expected to earn despite his injuries."

Again, over objection, plaintiff's expert testified that the present value of future lost earnings, based on a painter's wages, would amount to $241,406. For reasons discussed earlier, such testimony was relevant for the

jury in assessing the extent of impairment of plaintiff's earning power.

When $50,923 is added to this sum, for wages lost between the injury and the date of trial, plus $30,000 in proven medical expenses, the total jury verdict of $600,000 can reasonably be found to include $277,671 as general compensatory damages.

If, as defendant wishes, the lesser earning power of plaintiff as a non-construction trades worker were used, future lost earnings today would amount to $105,595. Deducting that sum, plus pre-trial wage loss and medical expenses leave general damages of $413,482.

Defendant complains that such an award of general damages, if sustained and prudently invested, could return to the plaintiff more money than he could accumulate even in a lifetime of effort.

However, the approach is improper. The Minnesota Supreme Court in its yet unpublished opinion in Busch v. Busch Construction Co., (Minn. S. Ct., December 9, 1977), has ruled that a trial court reviewing a jury verdict may not consider the investment return on a general compensatory damage award. That is because the law does not require an injured plaintiff to invest his pain, suffering and disability award and then apply it toward future lost wages.

The question of damages on review here is simply whether a general damage verdict of $277,671 to $413,482 can be considered excessive when a plaintiff has suffered a 25 percent permanent disability of the whole person because of the loss of 70 per cent of his stomach,

persisting speech problems and neurological defects. It is this Court's opinion that a general verdict approximating those figures is not excessive.

Defendant in its Motion for a New Trial also claims error of the Court in permitting Professor Egge to estimate the present value of future wages lost, based on a projected inflation rate for the future.

A review of the transcript of the expert's testimony shows that in fact he did not project inflationary trends for the future and in fact himself proclaimed that economists "are notoriously poor predictors" of future inflation. There was a complete absence of speculation on inflation in Professor Egg's testimony. His statements were derived totally from historical review of past inflationary experience.

By charting the average interest rate for U.S. Government corporate bonds from 1973 to 1976, he found the increase on an annual basis to be 4 per cent. In the same 45 year period, he charted the average rate of inflation, and it was 3 per cent. His testimony was that inflation in that historical period was "just 1.1 per cent less than the interest rate."

Next, the expert looked at the shorter time span from 1971 through 1976, and found the average interest rate "was a whopping 7.2 per cent," but average inflation during the same 5 years was 6.6 per cent.

By comparison of the two historical skethches, Professor Egge came to the conclusion that the rate of interest has been, generally speaking, at least 1 per cent above the rate

of inflation. "And to be conservative," he testified, "I'm going to use 1.5 per cent..."

Armed with this historical analysis, the plaintiff's expert accomplished his objective of finding the "real interest rate" of 1.5 per cent. Discounting future wages lost to the plaintiff by that "real interest" percentage, he calculated that the present value today of a $3,900 loss in earning power over 35 years of life which the plaintiff could expect in five construction trades is equal to $105,595. As a painter, plaintiff's monthly loss of earnings at $743 according to Egge, has a present value of $241,406.

It should be noted that the Minnesota Supreme Court has held that a jury may consider "the inflationary trend of the economy," Moteberg v. Johnson, 297 Minn. 28, 210 N.W. 2d 27 (1973). More recently it was held that an hypothesis, such as that of Professor Egge, that the past relationship between interest and inflation will continue to be constant, is properly admitted in the process of calculating the present value of future earnings loss. Ossenfort v. Associated Milk Producers, Inc., Minn. , 254 N.W. 2d 672, 684 (1977). It is clear, therefore, that there was no error in the expert testimony.

Based on the foregoing, IT IS HEREBY ORDERED That the post-trial motions of defendant for new trial, remittitur or judgment notwithstanding the verdict are denied.

DATED: June 8, 1978

Miles W. Lord
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MINNESOTA - FIFTH DIVISION

KEITH VAGLE,

Civ. 5-75-40

-vs-

JUDGMENT

PICKANDS MATHER & COMPANY

This action came on for trial before the Court and a jury, Honorable Miles W. Lord, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its SPECIAL VERDICT,

It is Ordered and Adjudged that Plaintiff, Keith Vagle, recover of the Defendant, Pickands Mather & Company, the sum of Five Hundred and Eighty-two Thousand and no/100 dollars, ($582,000.00), and his costs of action to be taxed.

Dated at Duluth, Minnesota this 14th day of November, 1977.

APPROVED:

s/ Miles W. Lord
Miles W. Lord,
United States District Judge

HARRY A. SIEBEN
Clerk of Court

By s/Catherine M. Ptacek
Catherine M. Ptacek,
Deputy Clerk

D1

Plaintiff - Keith Vagle
Defendant - Pickands Mather & Co.
Civ. Docket No. 5-75-40
Page 5 of _____pages

11/14/77 41 JUDGMENT, pursuant to SPECIAL JURY VERDICT as follows:

It is ordered and adjudged that Plaintiff, Keith Vagle, recover of Defendant, Pickands Mather & Company, the sum of Five Hundred and Eighty Two Thousand and no/100 dollars ($582,000.00), and his costs of action to be taxed.
Ent'd in Judgment Lien Docket C, Page 78.

E1

JUDGMENT

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 78-1569 September Term, 1978

Keith Vagle,

Appellee,

vs.

Pickands Mather & Company,

Appellant.

Appeal from the United States District Court for the District of Minnesota.

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, vacated as to $582,000 against appellant.

And it is further ordered by this Court that the cause be and is hereby remanded ot the District Court for entry of judgment in the amount of $222,000 in accordance with the opinion of this Court.

August 20, 1979

A true copy.
Attest: s/Robert C. Tucker

Filed September 19, 1979 USDC
September 17, 1979 USCA

F1
DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FIFTH DIVISION

Keith Vagle,

Plaintiff/Appellee

-vs-

No. 5-75-40 Civil

Pickands Mather & Co.,

Defendant/Appellant

Clerk's Notice Under F.R.C.P. Rule 77d

You are hereby notified that in the above entitled cause, on the 19th day of September, 1979, we filed Opinion and Judgment of the U. S. Court of Appeals for the Eighth Circuit vacating the Judgment of $582,000 against the Appellant. and further ordering that this cause be remanded to District Court for entry of Judgment in the amount of $222,000 in accordance with the opinion of said Court.

Copy of Judgment enclosed HARRY A. SIEBEN, CLERK

By_____
Catherine M. Ptacek,
Deputy Clerk

To: Paul J. Louisell, Attorney at Law
1409 Alworth Building
Duluth, Minnesota 55802
Attorney for Plaintiff/Appellee

Gene W. Halverson, Attorney at Law
700 Providence Building
Duluth, Minnesota 55802
Attorney for Defendant/Appellant

G1
MINNESOTA STATUTES AND MINNESOTA JOINT AND SEVERAL TORT LIABILITY RULE

MS 176.061 THIRD PARTY LIABILITY

Subd. 5. CUMULATIVE REMEDIES. Where an injury or death for which compensation is payable is caused under circumstances which created a legal liability for damages on the part of a party other than the employer, that party being then insured or self-insured in accordance with this chapter, and the provisions of subdivisions 1,2,3, and 4 do not apply, or the party other than the employer is not then insured or self-insured as provided by this chapter, legal proceedings may be taken by the employee or his dependents against the other party to recover damages, not withstanding the payment by the employer or his liability to pay compensation. If the action against such other party is brought by the injured employee or his dependents and a judgment is obtained and paid or settlement is made with the other party, the employer may deduct from the compensation payable by him the amount actually received by the employee or dependents in accordance with subdivision 6. If the action is not diligently prosecuted or if the court deems it advisable in order to protect the interests of the employer upon application the court may grant the employer the right to intervene in any such action for the prosecution thereof. If the injured employee or his dependents agree to receive compensation from the employer or institute proceedings to recover the same or accept from the employer any payment on account of such compensation, the employer is subrogated to the rights of the employee or his dependents. This employer may maintain an action or continue an action already instituted. This action may be maintained in the name of the employee or the

names of the dependents or in the name of the employer against such other party for the recovery of damages. If the action is not diligently prosecuted by the employer or the court deems it advisable in order to protect the interest of the employee, the court, upon application, may grant to the employee or his dependents the right to intervene in the action for the prosecution thereof. The proceeds of such action or settlement thereof shall be paid in accordance with subdivision 6. Such party is not liable to any person other than the employee or his dependents for any damages resulting from the injury or death.

Subd. 6. COSTS, ATTORNEY FEES, EXPENSES. The proceeds of all actions for damages or settlement thereof under this section, received by the injured employee or his dependents or by the employer as provided by subdivision 5, shall be divided as follows:

(a) After deducting the reasonable cost of collection, including but not limited to attorneys fees and burial expense in excess of the statutory liability, then

(b) One-third of the remainder shall in any event be paid to the injured employee or his dependents, without being subject to any right of subrogation.

(c) Out of the balance remaining, the employer shall be reimbursed in an amount equal to all compensation paid under this chapter to the employee or his dependents by the employer less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or his dependents from the other party multiplied by all compensation paid by the employer to the

employee or his dependents.

(d) Any balance remaining shall be paid to the employee or his dependents, and shall be a credit to employer for any compensation which employer is obligated to pay, but has not paid, and for any compensation that such employer shall be obligated to make in the future.

There shall be no reimbursement of credit to employer for interest or penalties.

19A DUNNELS MINNESOTA DIGEST - SECOND SERIES, TORTS

3.03. Equities between tort feasors.

The question of liability as between two tort feasors is immaterial in determining the liability of either to the injured person.

N36. Nees vs. Minneapolis St. Ry. 218 M 532, 16 N.W. 2d 758.

But the codefendants should be allowed to have the liabilities as between themselves and adjudicated along with the main controversy.

N37. Kemmerer vs. State Farm Mut. Auto Ins. Co., 201 M 239, 276 N.W. 228.

Supreme Court, U. S.
FILED
DEC 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-773

KEITH VAGLE,

Petitioner,

vs.

PICKANDS MATHER & CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HALVERSON WATTERS BYE DOWNS
& MAKI, Ltd.
By Gene W. Halverson
Steven L. Reyelts
Attorneys for Respondent
700 Providence Building
Duluth, Minnesota 55802
Telephone: (218) 727-6833

1979—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement of Case	3
Argument	3
Conclusion	5
Respondent's Appendix A—Opinion of the Eighth Circuit Court of Appeals of November 20, 1979	RA-1
Respondent's Appendix B—Order of the Eighth Circuit Court of Appeals of November 20, 1979	RB-1

TABLE OF AUTHORITIES

Cases:

Durham v. U.S., 41 U.S. 481, 91 S.Ct. 858, 20 L. Ed. 2d 200 (1971)	4
Rice v. Sioux City Memorial Parks Cemetary, Iowa, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955)	5

Statutes:

U.S. Sup. Ct. Rule 19, 28 U.S.C.A.	5
U.S. Sup. Ct. Rule 20, 28 U.S.C.A.	4

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-773

KEITH VAGLE,

Petitioner,

vs.

PICKANDS MATHER & CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pickands Mather & Co., Respondent herein, prays that the Petition for Writ of Certiorari herein be denied.

I.

OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals of November 20, 1979, is printed in Respondent's Appendix hereto (page RA1).

The Order of the United States Court of Appeals for the

Eighth Circuit of November 20, 1979, is printed as Respondent's Appendix B (page RB1).

The Opinion of the Eighth Circuit Court of Appeals of August 20, 1979, printed in Appendix A to the Petition herein has been withdrawn and substituted by the above.

II.

JURISDICTION

Petitioner bases jurisdiction of the Court upon the opinion of the three-judge panel of the Eighth Circuit Court of Appeals entered August 20, 1979. The Petition for rehearing en banc was not denied on September 17, 1979, as alleged by Petitioner, and Petitioner's Appendix A (page A1) does not reflect any order denying the Petition for rehearing in banc.

The jurisdictional arguments of Respondent herein are detailed in Section VI of this Brief, infra.

III.

STATUTES INVOLVED

IV.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by Petitioner and consideration of the Statutes involved as presented by Petioner are rendered moot by the Opinion of the Eighth Circuit Court of Appeals (Respondent's Appendix A, infra) entered on November 20, 1979.

V.

STATEMENT OF CASE

Respondent offers only the additional factual data it deems necessary to correct inaccuracies and omissions in Petitioner's statement of the case.

Specifically, Respondent must correct and supplement Petitioner's description of the proceedings in the Eighth Circuit Court of Appeals as contained in the last paragraph of Page Eight of the Petition herein.

The Opinion of the United States Court of Appeals of the Eighth Circuit on which Petitioner predicates his Petition was filed on August 20, 1979. Petitioner filed a Petition for Rehearing with the Court of Appeals on September 4, 1979. On September 7, 1979, the Court of Appeals requested from Respondent an Answer to the Petition for Rehearing, which Answer was filed on September 14, 1979. On September 17, 1979, prior to receipt of Respondent's Answer to Petition for Rehearing, the Court of Appeals issued its Mandate with reference to its Opinion of August 20. No Order was issued by the Court of Appeals denying the Petition for Rehearing.

Finally, on November 20, 1979, the Court of Appeals withdrew its Opinion of August 20, 1979, and replaced it with its latest opinion. Judgment was entered in accordance with the Opinion of November 20, 1979.

VI.

ARGUMENT

1. The Opinion of the United States Court of Appeals for the Eighth Circuit filed August 20, 1979, upon

which Petitioner particates his Petition for a Writ of Certiorari, is a nullity, having been withdrawn by Order of the Court of Appeals filed November 20, 1979. While review on writ of certiorari is a matter of sound judicial discretion under Supreme Court Rule 19, *Durham v. U.S.*, 41 U.S. 481, 91 S.Ct. 858, 20 L.Ed. 2d 200 (1971), the Court cannot review an opinion which no longer exists.

2. The judgment upon which Petitioner seeks review is not final. Petitioner filed a Petition for Rehearing with the Court of Appeals on September 4, 1979. On September 7, 1979, the Court of Appeals rquested an Answer to the Petition for Rehearing, which Answer was filed September 14, 1979. At the time of the filing of the instant Petition for Writ of Certiorari, the Court of Appeals had not yet ruled on the Petition for Rehearing and had not yet entered its final judgment.

While it is true that on rare occasions a writ of certiorari will be granted to review a case prior to the final judgment of the Court of Appeals, Supreme Court Rule 20 provides that such review will be granted ". . . only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court."

Petitioner has failed to allege the "imperative public importance" of this matter. Accordingly, the petitioned-for Writ should not be granted prior to final judgment in the Court of Appeals.

3. Petitioner has failed to allege that "special and important reasons" exist for review on writ of certiorari. A

showing of "special and important reasons" is a jurisdictional requirement of Supreme Court Rule 19. See *Rice v. Sioux City Memorial Parks Cemetary, Iowa,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Accordingly, the petitioned-for Writ should not be granted.

4. Respondent chooses not to address the merits of the decision upon which the Petition herein is based. To argue upon a decision upon which has been withdrawn is, of course, unnecessary and would constitute a monumental waste of legal resources. The Opinion of the Court of Appeals dated November 20, 1979, reaches a conclusion which differs with that of August 20, 1979, and renders moot the contentions set forth in the Petition herein.

VII.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the Petition for a Writ of Certiorari should be denied.

Dated this 7th day of December, 1979.

Respectfully submitted,

HALVERSON WATTERS BYE DOWNS & MAKI, LTD.
By Gene W. Halverson
Steven L. Reyelts
Attorneys for Respondent
700 Providence Building
Duluth, Minnesota 55802
Telephone: (218) 727-6833

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1569

Keith Vagle,

Appellee,

vs.

Pickands Mather & Company,

Appellant.

Appeal from the United States District Court
for the District of Minnesota

Submitted: January 11, 1979

Filed: November 20, 1979

Before ROSS and McMILLIAN, Circuit Judges, and VAN SICKLE,* District Judge.

McMILLIAN, Circuit Judge.

Appellant, Pickands Mather, appeals from a jury verdict of $582,000 in favor of appellee, Keith Vagle, on Vagle's personal injury claim. For reversal appellant argues that the district court erred (1) in instructing the jury that Pickands Mather was vicariously liable for the negligence of Conomos, the independent contractor and appel-

*The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota, sitting by designation.

lee's employer; (2) in holding, as a matter of law, that as managing agent of Erie Properties, Pickands Mather was liable for torts committed by Erie employees; (3) in instructing the jury that appellant had a duty to warn appellee of the electrical substation: (4) in admitting into evidence OSHA Regulations as a guide on the standard of care; and (5) in failing to rule that the jury's award of damages was excessive. We agree with appellant that the court improperly instructed the jury that it was vicariously liable for negligence on the part of Conomos and reverse and remand for a new trial.

Appellant, Pickands Mather & Company, is a Delaware corporation with its principal place of business in Ohio. It is the "Managing Agent" of Erie Mining Company, a Minnesota corporation which mines taconite at Hoyt Lakes, Minnesota. John B. Conomos Painting Contractors (Conomos) is a Pennsylvania corporation engaged primarily in providing industrial painting services. At the time of the accident, Conomos had contracted to paint the exterior of the Erie Mining Plant at Hoyt Lakes. Appellee, Keith Vagle, was a painter employed by Conomos.

On September 5, 1973, Vagle and a co-worker, Tom Henderson, were standing on a scaffold at Erie's Hoyt Lakes property spray-painting a steel bridge which runs parallel to and within a few feet of an electrical transformer substation. As Henderson attempted to unplug his spray gun, the hoses attached to his spray gun touched the "live" portion of the electrical substation and the electrical charge from the 13,800 volt substation knocked both painters to the ground. As a result of the accident Vagle lost 70% of his stomach and developed a speech impairment due to persisting neurological defects. suffering a total disability of 25%.

Although Pickands Mather was the only defendant, the jury was instructed to determine the comparative negligence of Conomos, Pickands Mather and Vagle. Vagle argued that Conomos negligently failed to make proper arrangements to guard and protect its employees from exposure to electrocution and that Pickands Mather negligently failed to warn Vagle and his co-workers of the danger, failed to guard and protect the transformer, and failed to shut off the transformer. The jury found that Conomos was 60% negligent, Pickands Mather 37% negligent and Vagle 3% negligent. It further found that Vagle was entitled to $600,000 damages, reduced by 3%, for a total judgment of $582,000.

Appellant's first claim of error is that the trial court improperly gave, as jury instructions, §§ 414, 416, 422 and 427 of Second Restatement of Torts (see appendix), which confer vicarious liability on Pickands Mather for Conomos' negligence. These Restatement sections confer liability on "one who entrusts work to an independent contractor" for negligence on the part of the independent contractor. Appellant argues that these instructions were improperly given because the employee of an independent contractor is not within the group of persons intended to be protected by the Restatement. We agree.

In this diversity case Minnesota law governs. The Minnesota Workmen's Compensation Statute provides that an employee who is covered by workmen's compensation and who is injured "under circumstances which create a *legal liability* for damages" on the part of a third party, cannot collect workmen's compensation and also sue the third party if the third party and the employee's employer are engaged in a "common enterprise." MINN. STAT. ANN.

§ 176.061 subd. 1 (West) (emphasis added). If, however, the employer and the third party are not engaged in a common enterprise, the employee may bring suit against the third party while also receiving workmen's compensation. Thus, two questions must be answered to determine if Vagle, who collected workmen's compensation from Conomos, may bring a suit against Pickands Mather: first, is Pickands Mather "legally liable" to Vagle, and second, if Pickands Mather is legally liable, is it immune from suit because it was engaged in a common enterprise with Conomos?

The jury was instructed that Pickands Mather could be found liable in two ways: first, directly liable for its own negligence, and second, vicariously liable for Conomos' negligence. Minnesota courts have held that the employer of an independent contractor will be liable to third parties, including the employees of the independent contractor, for the employer's *own* negligence. *E.g., Whirlpool Corp. v. Morse,* 222 F. Supp. 645 (D. Minn. 1963), *aff'd,* 322 F.2d 901 (8th Cir. 1964) (per curiam) (employer failed to exercise reasonable care to see to it that his premises were safe for business invitees which, under Minnesota law, include employees of independent contractor); *Thill v. Modern Erecting Co.,* 272 Minn. 217, 136 N.W.2d 677 (1965) (interference or other negligent exercise of control retained by employer over performance of work of independent contractor). However, the Minnesota courts have not decided whether the employer of an independent contractor can be held vicariously liable, that is, liable for the negligence of the independent contractor although the employer is free from fault, to the *employees* of the independent contractor. *Cf. Olson v. Kilstofte & Vosejpka, Inc.,* 327 F. Supp. 583, 588 (D. Minn. 1971), *aff'd sub nom. Olson v. Red Wing Shoe Co.,* 456 F.2d 1299 (8th Cir. 1972) (per curiam) (district court resolution of vicarious liability issue noted as unaddressed as yet by the Minnesota state courts).

Generally, the employer of an independent contractor is not liable to third parties for the negligence of the independent contractor or the employees of the independent contractor. *E.g., Rausch v. Julius B. Nelson & Sons, Inc.,* 276 Minn. 12, 149 N.W.2d 1 (1967). There is an exception to the general rule of the employer's nonliability for so-called "nondelegable duties." "Where the law imposes a definite, affirmative duty upon [an employer] by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor." F. HARPER, LAW OF TORTS § 292 (ed. 1933), *cited in Van Arsdale v. Hollinger,* 68 Cal. 2d 245, 437 P.2d 508, 512, 66 Cal. Rptr. 20 (1968) (bank). Thus, the employer of an independent contractor is subject to vicarious liability "to others" when the work to be performed is likely to create a peculiar unreasonable risk of physical harm unless special precautions are taken under Restatement §§ 413 and 416 or when a special danger is inherent or normal to the work under Restatement § 427.

The Restatement sections[1] at issue use the word "oth-

[1]Restatement § 414 does not subject the employer of an independent contractor to vicarious liability. It imposes liability upon an employer of an independent contractor who retains control of any part of the work. "The employer must have retained at least some degree of control over the manner in which the work is done . . . . There must be

ers" to describe those persons to whom the employer of an independent contractor owes such "nondelegable duties." Appellant Pickands Mather argues that "others" should not be read to include the employees of an independent contractor. As stated earlier, Minnesota courts have not yet addressed this question. There is a definite split of authority Some courts have held that this vicarious liability does *not* extend to employees of independent contractors. *E.g., Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030, 1034-35 (5th Cir. 1977); *Craig v. Olin Mathieson Chemical Corp.*, 427 F.2d 962 (7th Cir.), *cert. denied*, 400 U.S. 964 (1970); *Parsons v. Amerada Hess Corp.*, 422 F.2d 610, 614 (10th Cir. 1970); *Lipka v. United States*, 369 F.2d 288, 292-93 (2d Cir. 1966), *cert. denied*, 387 U.S. 935 (1967); *Sloan v. Atlantic Richfield Co.*, 552 P.2d 157, 160 (Alas. 1976); *Welker v. Kennecott Copper Co.*, 1 Ariz. App. 395, 403 P.2d 330, 339 (1965); *Florida Power & Light Co. v. Price*, 170 So. 2d 293, 298 (Fla. 1964); *King v. Shelby Rural Electric Cooperative Corp.*, 502 S.W.2d 659, 661-663 (Ky. 1973), *cert. denied*, 417 U.S. 932 (1974); *Hader v. Coplay Ce-*

such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." RESTATEMENT (SECOND) OF TORTS §414, Comment c at 388 (1965). The district court did not err in giving Restatement § 414 as an instruction; the degree of control exercised by Pickands Mather, if any, would be an issue on remand.

Restatement § 422 does impose vicarious liability on the employer of an independent contractor. Judge Neville in *Olson* determined that this section should not be applied to an employee of the independent contractor injured while working on a construction job. 327 F. Supp. at 585. Judge Neville read the section "to apply to a situation, for instance, where an independent contractor overnight leaves the premises in a dangerous condition and someone falls into a hole or otherwise and injures himself as the result of a negligently defective condition." *Id.* The same result is reached by reading "others" not to include employees of the independent contractor. *See* discussion in text *infra*.

ment Mfg. Co., 410 Pa. 139, 189 A.2d 271, 177 (Pa. 1963); *Humphreys v. Texas Power & Light Co.*, 427 S. W.2d 324, 330-31 (Tex. Civ. App. 1968); *Epperly v. City of Seattle*, 65 Wash. 2d 777, 399 P.2d 591, 597 (1965). Other cases hold that the employees of the independent contractor are within the protected class. *E.g., Lindler v. District of Columbia*, 164 U.S. App. D.C. 35, 502 F.2d 495 (1974); *United States v. DeCamp*, 478 F.2d 1188 (9th Cir.), *cert. denied*, 414 U.S. 924 (1973) (California); *Van Arsdale v. Hollinger, supra*, 68 Cal. 2d 245, 437 P.2d at 514, 66 Cal. Rptr. 20; *Giarrantano v. Weitz Co.*, 259 Iowa 1292, 147 N.W.2d 824, 834 (1967); *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617, 624 (banc 1928); *International Harvester Co. v. Sartain*, 32 Tenn. App. 425, 222 S.W.2d 854, 868 (1948); *see also* RESTATEMENT (SECOND) OF TORTS, Ch. 15, Special Note (Tent. Draft No. 7, 1962).

In the absence of controlling Minnesota law, we read the late Judge Neville's analysis in the *Olson* case to be dispositive. Judge Neville was "strongly persuaded that the employees of an independent contractor should *not* be included among those to whom a contractee [the employer] owes a nondelegable duty to take precautions required by the specific work in which they are engaged." 327 F. Supp. at 588 (emphasis added). There are several policy reasons supporting this view. First, the employer of the independent contractor has in effect paid the workmen's compensation premiums for the employees of the independent contractor because this expense is included in the fee charged by the independnt contractor for its services. *Id.; Slaon v. Atlantic Richfield Co., supra*, 552 P.2d at 159. Therefore the rule that an employee who collects work-

men's compensation from his immediate employer does not have a common law right of action against that employer should also apply to the independent contractor's employer.

The second policy reason follows from the first. If the employer of an independent contractor is held vicariously liable to employees of the independent contractor, that entity, because it has in effect paid for workmen's compensation and is still liable in common law, has a greater liability to the employees of the independent contractor than it does to its own employees. *Cochran v. International Harvester, supra,* 408 F. Supp. at 602-603; *cf. King v. Shelby Rural Electric Cooperative Corp., supra,* 502 S.W. 2d at 663. By the same token, such a policy would create an unwarranted windfall for those employees who happen to be working for an independent contractor.

The last policy reason is that the rational supporting imposition of vicarious liability to third persons on one who hires an independent contractor for hazardous work is inapplicable when the third person is an employee of the independent contractor. The rule originated to prevent one from contracting out such work to an independent contractor and thereby escaping the responsibility to the public and adjoining property owners of dangers inherent in hazardous activities. However, one who hires an independent contractor with employees specialized in the hazardous work should not be penalized by being held vicariously liable in common law. *Olson v. Kilstofte & Vosejpka, Inc., supra,* 327 F. Supp. at 588; *Welker v. Kennecott Copper Co., supra,* 403 P.2d at 339.

Appellee argues that *Olson* is inapposite and cites several cases as holding that the employer of an independent contractor can be held vicariously liable to the employees of the independent contractor. Most of the cases cited by appellee do acknowledge that an employee may sue a third party tortfeasor to obtain a full common law recovery in addition to workmen's compensation benefits; however, in none of the cases was the plaintiff an employee of an independent contractor seeking to hold the employer of the independent contractor *vicariously* liable. *E.g., Lambertson v. Cincinnati Corp.,* 312 Minn. 114, 257 N.W.2d 679 (1977); *Sorenson v. Safety Flare, Inc.,* 298 Minn. 353, 216 N.W.2d 859 (1974); *Hillman v. Wallin,* 298 Minn. 346, 215 N.W.2d 810 (1974); *Haney v. International Harvester Co.,* 294 Minn. 375, 201 N.W.2d 140 (1972); *Froysland v. Leef Bros.,* 293 Minn. 201, 197 N.W.2d 656 (1972). In the one instance cited by appellee where the employee of a subcontractor sued the general contractor which had hired the subcontractor, the issue on appeal concerned only the contractor's right of indemnification from the subcontractor; the propriety of the subcontractor's employee recovering from the general contractor never arose. *Keefer v. Al Johnson Constr. Co.,* 292 Minn. 91, 193 N.W.2d 305, 307 (1971).

On the basis of the above discussion, we are able to define the extent of Pickands Mather's "legal liability" to Vagle. Pickands Mather may be held liable for its own negligence, but may *not* be held *vicariously* liable to Vagle, the employee of the independent contractor, for the negligence of the independent contractor.

The second question we must address is whether Pickands Mather is immune from suit. If Pickands Mather and Conomos, Vagle's employer, are engaged in a "common enterprise," Pickands Mather is immune from suit.

However, this is clearly not the case. Merely making repairs on the third party's premises does not make the third party and the employer of the injured employee "engaged in a common enterprise." *Chenette v. Trustee of Iowa College, Grinnell, Iowa,* 431 F.2d 49, 53 (8th Cir. 1970); *Gleason v. Geary,* 214 Minn. 499, 8 N.W.2d 808, 811 (1943). To find a common enterprise the employees of the two employers must be engaged in the same project and exposed to the same or similar hazards. *Id.* at 812. This is clearly not the case, for no Pickands Mather or Erie employees were assisting in the painting or in any way exposed to the danger of electrocution. Therefore, Conomos and Pickands Mather are not engaged in a common enterprise and Pickands Mather is not immune from suit for its own negligence.

Thus, we conclude that the district court erroneously instructed the jury on the issue of vicarious liability. Further, because we cannot state with reasonable assurance that the erroneous instructions on the issue of vicarious liability did not influence or materially affect the jury's verdict, we reverse and remand for a new trial on the issue of damages as well as liability. *See Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc.,* 513 F.2d 407, 421-22 (D.C. Cir. 1975), *citing Gasoline Products Co. v. Champlin Refining Co.,* 283 U.S. 494, 550 (1931); *Lowery v. Clouse,* 348 F.2d 252, 256 (8th Cir. 1965). A new trial is not warranted on the other issues raised on appeal.

Appellant's second point of error is that the trial court erred in holding, as a matter of law, that Pickands Mather was liable for activities of Erie employees which may

have caused the accident. As stated, Erie Mining Company, owner of the premises on which the accident occurred, hired Pickands Mather as managing agent of its enterprises including management of its Hoyt Lake property. At the time of Vagle's accident, Erie had 2,900 employees at this site while Pickands Mather had four, all of whom were top level management personnel. Appellant has spent considerable time attempting to argue, under agency principles of law, why Erie, rather than Pickands Mather, is liable in this case,[2] and why the court erred in failing to submit the issue of agency to the jury. The liability of appellant, however, does not rest upon agency theory. Instead, it rests on the clear and concise contract in which Erie and Pickands Mather delineated their responsibilities. *Cf. Minneapolis Mill Co. v. Wheeler,* 31 Minn. 121, 16 N.W. 698 (1883) (a mill company was renting land and was under obligation with the owner of property to maintain a bridge; when the bridge collapsed because of negligent repair, the mill owners were liable pursuant to an agreement between the owner of the property and the mill company).

The agreement between the parties provided:

> Among the things to be managed and supervised by the Manager [Pickands Mather] are . . .

---

[2]In arguing this point, appellant has submitted the following cases as supporting its position that it is not liable: *Towt v. Pope,* 168 Cal. App. 2d 351, 336 P2d 276 (1959); *Malloy v. Fong,* 37 Cal. 2d 356, 232 P.2d 241 (1951); *Morgan v. Eaton's Dude Ranch,* 307 Minn. 280, 239 N.W.2d 761 (1976). These cases are not apropos. As the district court pointed out, they all involve the responsibility of a *corporate officer* rather than the responsibility of a *corporate entity.* Their lack of applicability is exacerbated even further by the fact that in this case a contract spells out the corporate entity's responsibility.

> the maintenance and protection of the Taconite Properties, . . .
>
> the securing of adequate and reasonable insurance covering risks growing out of personal injury to, or death of, employees and others, risk of fire and other risks ordinarily insured against . . .
>
> [the] compliance with all laws including laws relating to . . . safety requirements . . .
>
> the doing of all such acts and things and the conducting of all such operations as may be necessary or advisable for the efficient and economical operation and care of the Taconite properties. . . .

In other words, the contract specifies that Pickands Mather is responsible for maintenance of the Taconite properties, for compliance with all safety regulations and for securing insurance coverage for "employees and others" who are injured. It is thus apparent that the contract between Erie and Pickands Mather specifies that the latter is liable for damages resulting from a failure to comply with safety regulations. Because it is well-established that construction of an unambiguous writing is for the court, *Cut Price Super Markets v. Kingpin Foods, Inc.*, 256 Minn. 339, 98 N.W.2d 257, 267 (1959), and because this contract is unambiguous, the trial court acted quite properly in construing Pickands Mather's contractual responsibilities itself rather than submitting the particularities of the relationship between Erie and Pickands Mather to the jury.

A third issue which appellant has raised is whether the

trial court erred in instructing the jury that Pickands Mather had a duty to warn Vagle of dangers inherent in the painting project. Appellant advances two arguments: (1) the trial court erred in instructing the jury that Pickands Mather had a duty to warn Vagle directly and, according to appellant, the court should have instructed the jury that Pickands Mather was only required to warn Conomos; and (2) alternatively, the trial court should have instructed the jury that Pickands Mather had no duty to warn of an obvious danger, which appellant claims the substation was.

The court instructed the jury that:

> A possessor of land has a duty to use reasonable care to inspect and repair his premises or to warn an entrant who comes upon his premises to protect the entrant from an unreasonable risk of harm caused by the condition of the premises while he is on the premises.

Appellant's first argument has no basis in fact. The court did not, as appellant argues, instruct the jury that Pickands Mather had a duty to warn Vagle directly. The court merely instructed the jury Pickands Mather had a duty to use "reasonable care" to warn an entrant, which Vagel was. The jury could well have found, just as appellant urges, that reasonable care required only that Pickands Mather warn Conomos, which would then warn its individual employees.[3] Given this ambiguity and the fact that

[3]Pickands Mather could have effectively discharged this duty by warning either Conomos or Vagle. In our opinion, it was neither practical nor legally necessary that Pickands Mather give individual warnings to each Conomos employee.

Minnesota law is unclear on this subjert, we cannot say the court's instructions on appellant's duty to warn were clearly erroneous or prejudicial to the point of requiring a new trial on this basis.

Appellant's second argument, that it had no duty to warn of an obvious danger, is also flawed. While it is true that the owner or possessor of premises has no duty to warn of obvious dangers, Minnesota courts have recognized that the duty to warn remains if the danger, however obvious, cannot be avoided. *Peterson v. W. T. Rawleigh Co.*, 274 Minn. 495, 144 N.W.2d 555, 558 (1966). As the trial court properly found, Vagle and Henderson were to paint the bridge directly over the substation and could not avoid the danger presented. Therefore, appellant's duty to warn of the substation, assuming arguendo it was an "obvious danger," did not abate.

Appellant has also argued that the trial court erred in allowing into evidence Vagle's Exhibit 26 which consisted of an Occupational Safety & Health Administration (OSHA) Safety Regulation regarding electrical installations on a jobsite. According to appellant, because Hoyt Lakes is a mining facility, the Mining Enforcement and Safety Administration (MESA) is the appropriate regulating authority and MESA regulations, not OSHA regulations, apply. Appellant argues that the trial court committed reversible trror in allowing into evidence the OSHA regulations. Because the OSHA regulations apply to electrical substations and because it is unclear to us whether the bridge Vagle and Henderson were painting was a "mine" and thus actually regulated by MESA rather than OSHA, we cannot say that the trial court erred in allowing the OSHA regulations into evidence.

Appellant challenged the amount of damages, arguing that the calculations of Vagle's anticipated income by Vagle's expert witness, Professor Karl Egge, were suspect because they exceeded Vagle's actual earnings in the year previous to the accident. We cannot agree that this renders Egge's calculations erroneous. Vagle was twenty-four years old at the time of the accident and spent the year previous to the accident attending scuba diving school, working off and on to finance his educational expenses and, in general, considering his career options. His earnings during such a transition period are scarcely reflective of what his earnings in future years will be. Therefore, Professor Egge's calculations of Vagle's anticipated earnings based on the assumption Vagle would remain at a construction job comparable to the one he held when injured are not inappropriate.

In conclusion, we agree with appellant that the district court erred in submitting as jury instructions §§ 416, 422 and 427 of the Restatement Second of Torts, which subjected Pickands Mather to vicarious liability to Vagle, an employee of the independent contractor Conomos. Accordingly, the judgment is reversed and remanded for a new trial on the issues of liability and damages.[4]

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

---

[4]Any award of damages should be apportioned according to the formula set forth in MINN. STAT. ANN. § 176.061, subd. 6 (West Supp. 1979). *See Johnson v. Raske Bldg. Systems, Inc.*, — Minn. —, 276 N.W.2d 79, 81 & n.5 (1979); *Lamberton v. Cincinnati Corp., supra*, 312 Minn. 114, 257 N.W.2d at 689.

§ 414. Negligence in Exercising Control Retained by Employer

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

§ 416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

§ 422. Work on Buildings and Other Structures on Land

A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the strucure

(a) while the possessor has retained possession of the land during the progress of the work, or

(b) after he has resumed possession of the land upon its completion.

§ 427. Negligence as to Danger Inherent in the Work

One who employes an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1569
September Term, 1979

Keith Vagle,

Appellee,

vs.

Pickands Mather & Company,

Appellant.

Appeal from the United States District Court for the District of Minnesota.

It is now here ordered by this Court that opinion of this Court in this cause on August 20, 1979, be and is hereby withdrawn. Opinion filed on November 20, 1979, will replace previously filed opinion.

November 20, 1979.